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IN THE

Supreme Court of the United States

October Term, 1979
No. 79-602

DONALD W. AGINS and BONNIE G. AGINS,

Appellants,

vs.

CITY OF TIBURON,

Appellee.

On Appeal From the Supreme Court of California.

APPELLANTS' BRIEF.

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Helix Land Co. v. City of San Diego, 82 Cal.App. 3d 932, 147 Cal.Rptr. 683 (1978) 46

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Sanfilipo v. County of Santa Cruz, 415 F.Supp. 1340 (1976, N.D. Cal.) 23, 48

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Trust of Three v. City of Emeryville, 430 F.Supp. 833 (1977, N.D. Cal.) 48

United States v. Causby, 328 U.S. 256 (1946) 22

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United States v. Dow, 357 U.S. 17 (1958) 16

United States v. General Motors, Inc., 323 U.S. 373 (1945) 23

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United States v. Kaiser Aetna, 584 F.2d 378 (1978, 9th Cir.) 32

United States v. Lynah, 188 U.S. 445 (1903) 15

United States v. Reynolds, 397 U.S. 14 (1970) 46

United States ex rel. TVA v. Welch, 327 U.S. 546 (1946) 42

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Welch v. Swasey, 214 U.S. 91 (1909) 32

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California Government Code, Sec. 65561 26
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City of Tiburon Ordinances, Ord. Nc. 124 N.S. 2, 6, 7, 28
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United States Constitution, Art. III 31
United States Constitution, Art. VI, cl. 2 34
United States Constitution, Fifth Amendment 2, 3, 15, 34, 55
United States Constitution, Fourteenth Amendment 2, 3, 53

Textbooks

Berger, To Regulate or Not to Regulate?—Is That The Question?, 8 Loyola L.A. L. Rev., pp. 253, 258-259 (1975) 22

Berger, You Can't Win Them All—Or Can You?, 54 Cal. State Bar Jour., p. 16 (1979) 46

Beuscher, Notes on the Integration of Police Power and Eminent Domain by the Courts: Inverse Condemnation, J. Beuscher and R. Wright, Land Use, p. 728 (1969) 22

Page

Bosselman, F., Address, ALI-ABA Land Planning and Regulation of Development Course, March 18, 1976 (quoted in Hagman and Misczynski, "Windfalls for Wipeouts," p. 12) 44

Frieden, "The Environmental Protection Hustle" (1979, MIT Press) 42

Hagman and Misczynski, Windfalls for Wipeouts, p. 222 (1978) 30

Longtin, Avoiding and Defending Constitutional Attacks on Land Use Regulations (Including Inverse Condemnation), 38B NIMLO Municipal Law Review, pp. 175, 192 (1975) 48

1 Nichols on Eminent Domain, Sec. 1.14(2) 15

Stoebuck, Condemnation by Nuisance: The Airport Cases in Retrospect and Prospect, 71 Dickinson L. Rev., pp. 207, 210 (1967) 21

Stoebuck, Condemnation of Rights the Condemnee Holds in Lands of Another, 56 Iowa L.Rev., pp. 293, 307 (1970) 20

Van Alstyne, Taking and Damaging by Police Power: The Search for Inverse Condemnation Criteria, 44 So. Cal. L. Rev., pp. 1, 2, fn. 5 21

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APPELLANTS' BRIEF.

THE OPINION BELOW.

The opinion of the Supreme Court of California is reported at 24 Cal.3d 266, 157 Cal.Rptr. 372, 598 P.2d 25. It is set out in Appendix A to the Jurisdictional Statement.

JURISDICTION.

The judgment of the Supreme Court of California became final as to that court on May 17, 1979. The Notice of Appeal to this Court was timely filed on July 6, 1979. On July 18, 1979, Mr. Justice Stevens extended Appellants' time to docket the appeal in this Court to October 12, 1979. The Jurisdictional Statement was filed October 11, 1979. This Court noted probable jurisdiction on January 7, 1980. Jurisdiction of this Court is invoked by 28 U.S.C. §1257(2).

Cases sustaining jurisdiction of this Court are:

Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978);

Moore v. City of East Cleveland, 431 U.S. 494 (1977);

Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962);

Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926);

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

1. *Fifth Amendment, United States Constitution:* ". . . nor shall private property be taken for public use, without just compensation."

2. *Fourteenth Amendment, United States Constitution:*

"Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

3. The City's open space ordinance, Ordinance 123 N.S., is set forth in Appendix D to the Jurisdictional Statement.

4. Ordinance 124 N.S. which rezoned Appellants' property into the open space category is set forth in Appendix E to the Jurisdictional Statement.

QUESTIONS PRESENTED.

1. Do the Fifth and Fourteenth Amendments prohibit the California Supreme Court from holding that monetary relief is *never* available when state regulatory action deprives an owner of land of all its value and use?

2. Does it violate the Fifth and Fourteenth Amendments for the California Supreme Court to provide that judicial invalidation is the only remedy for a landowner whose property has been taken by excessive regulatory acts?

3. Where a state regulation recites that certain uses can be made of private property does the property owner have a right under the Fifth and Fourteenth Amendments to allege and to prove that those recited uses are neither possible nor feasible and that he, therefore, has no available use at all?

4. Where California, by statute, authorizes cities to condemn private property for open space, can the City of Tiburon, without violating the Fifth and Fourteenth Amendments, acquire such open space use without payment to the property owner by use of its regulatory powers?

5. On the facts at bench, where the Appellants' property was stultified by regulation into uselessness and worthlessness, does the constitutional policy of fairness require that the ensuing economic burden be borne by the benefited public as a whole and not be disproportionately placed on Appellants?

STATEMENT OF THE CASE.

This appeal arises from the California Supreme Court's affirmance of the dismissal of Appellants' inverse condemnation and declaratory relief action. Thus, the substantive facts are those alleged in Appellants' Complaint plus the two City ordinances of which the California courts took judicial notice. For purposes of the appeal, the facts which are alleged are taken as true under both Federal and California law.

Appellants own five acres of undeveloped land within the City of Tiburon which they purchased for residential development. Except for the restrictive ordinances adopted by the City, this property would have been available and adaptable for such residential uses. The five acres are classified as "ridgelands" and possess a magnificent view of San Francisco Bay and the surrounding areas. (J.A. 4, 5)[1]

The City of Tiburon is in Marin County, California, on the north edge of San Francisco Bay. It is one of the smaller cities of California, containing only 1,676 acres. Its population is 6,209 according to the 1970 census. The City's favorable climate, aquatic facilities, proximity to the San Francisco Metropolitan area and sweeping view of San Francisco bay make it one of the most desirable places to live within California. It has one of the highest land values per acre of the suburban areas of the State. (J.A. 4) Of the undeveloped acreage within the City, appellants' five acres are among the most desirable and contain among the best views. (J.A. 4)

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[1]This is a reference to the Joint Appendix at pages 4 and 5. References to the Appendices to the Jurisdictional Statement will also be made, *e.g.* (J.S.A. ....).

In 1959, California enacted Sections 6950-6954 of the Government Code which specifically authorize the acquisition of private property by local government for open space purposes. These open space purposes are declared to be public uses. The exercise of the eminent domain power to acquire property for open space is specifically authorized. (J.S.A. 47-51)

Commencing in 1967, the California Legislature enacted provisions in the Government Code giving authority for cities and counties to adopt General Plans for land use and setting forth the scope of such General Plans. In 1970, these provisions were amended to provide that General Plans must include Open Space Elements to be in accordance with the Local Open Space Plan provisions of the Government Code. (J.S.A. 51-52) In 1972, the Legislature adopted Government Code Section 65302.2, making mandatory the adoption of General Plans with Open Space Elements.

Also in 1970, California enacted provisions in its Government Code requiring every city to adopt an open space zoning ordinance. (J.S.A. 50-51)

In January, 1972, the City employed Dean Witter & Company, Incorporated ("Witter") to prepare a plan so the City could finance the acquisition of property to own and hold for open space purposes. (J.A. 6) Witter prepared that plan and submitted it to the City which approved it. This plan identified the Agins' property as part of the total property to be acquired from the funds that were to be raised by a bond issue. (J.A. 6) The bond issue was approved, and the bonds were sold. The City used the funds obtained to purchase for open space the land adjacent to the Agins. The City, however, did not purchase the Agins' five acres. (J.A. 7)

During this same period in the first part of 1972, the City employed the planning firm of Williams & Mocine ("Williams") to prepare an Open Space Plan. Williams submitted its Open Space Plan to the City in October, 1972. (J.A. 7) It identified the Agins' five acres as "indispensable to and necessary for the open-space plan" of the City. Further, it stated that the Agins' property be purchased by the City to meet the requirements of the City's proposed open space ordinance. (J.A. 7)

To carry out the recommendations of Witter and Williams, the City, on October 25 and 26, 1973, adopted resolutions declaring it to be in the public interest and necessity that the City acquire by condemnation for open space the Agins' five acres and the twenty-five adjoining acres. Six weeks later, on December 4, 1973, the City filed its Complaint in eminent domain against Appellants seeking to acquire their five acres for public use, namely, for open space. (J.A. 9-10)

In the year that followed, the City altered not its objective but its method for keeping the Agins' property in open space. Rather than proceed to trial of the eminent domain proceeding, the City, in November, 1974, filed a notice of abandonment, as the result of which the case was completely dismissed. (J.A. 9-10) Since that time the City has relied upon its zoning ordinances, 123 N.S. and 124 N.S. to accomplish the City's aims and objectives of preserving the Agins' five acres in open space. (J.A. 11)

On June 28, 1973, the City adopted Ordinance 123 N.S. It created a special restrictive zone for open space purposes known as "Residential Planned Development and Open Space Zone". By its language it pur-

portedly authorized (1) one-family dwellings; (2) open space uses; and (3) accessory buildings and accessory uses. Density of buildings was limited to not less than one unit per five acres nor more than one unit per acre. Also on June 28, 1973, the City adopted companion Ordinance 124 N.S. by which particular parcels of undeveloped land, including the Agins' five acres, were placed into this zoning. (J.S.A. 41-46, J.A. 6)

The five acres owned by the Agins were never purchased or otherwise formally acquired by the City. Rather, the Agins continue as the ostensible record owners of the property. But because of the restrictions of Ordinance 123 N.S., they are unable to make any use whatsoever of their property. The City's actions have completely destroyed the value of their property for any purpose or use by them whatsoever and have prevented any sale, use, transfer or development of the property or any part of it (except, presumably, a transfer by gift to the City for open space purposes). (J.A. 8)

The Complaint in this case was filed June 16, 1975. (J.A. 2, 4) It alleged two causes of action. The first was that the result of the City's actions has been the taking of their property without payment of just compensation in violation of their Federal and State Constitutional rights and that they should have judgment for their just compensation which they alleged to be $2,000,000. (J.A. 12) The second was for a declaratory judgment that the Open Space Zoning Ordinance was invalid because confiscatory and in excess of the City's authority. (J.A. 12)

The City demurred to the Complaint. (J.A. 2) The trial court sustained the demurrer without leave to

amend as to the cause of action for inverse condemnation and sustained the demurrer on the cause of action for declaratory relief with leave to amend. (J.A. 2) The Agins declined to amend their Complaint, and the trial court thereupon entered a Judgment of Dismissal of the action on May 5, 1976. (J.S.A. 25, J.A. 2)

The Agins appealed to the California Court of Appeal. On April 24, 1978, it reversed the Judgment of Dismissal of the inverse condemnation cause of action and affirmed the Judgment of Dismissal of the declaratory relief cause of action. The City then petitioned the California Supreme Court for a hearing. A hearing was granted which vacated and expunged the opinion of the Court of Appeal.

The California Supreme Court, by its opinion, affirmed the dismissal by the trial court of both the first and second causes of action, holding that Appellants were not entitled to relief in either inverse condemnation or declaratory relief. (J.S.A. 1-15) Justice Clark dissented. (J.S.A. 16-24)

The Agins alleged in their Complaint that the restrictions upon their property to the uses of ordinance 123 N.S. deprived them of all use and all value of their property. In effect, they claimed that, because of the zoning, their property lost all its economic use and value for one-family dwellings, for open space uses, or for accessory uses. (J.A. 6) The California Supreme Court, in ruling upon those allegations of the first cause of action in inverse condemnation, treated

them as true, that is, that no economic use or value existed for the property under that zoning.[2]

As to the inverse condemnation cause of action the California Supreme Court held that even when all value and use of property is destroyed by a land use regulation the property owner cannot *ever* have a right to just compensation; his sole and exclusive remedy is to challenge the regulation's validity by a mandamus or declaratory relief action. (J.S.A. 6) It stated that even if the allegations of the Agins' Complaint were proved as true, they would have no right to compensation. In effect, the Court held that monetary compensation to the property owner is not available even when the use and value of his property has been taken for the benefit of the public at large by a confiscatory land use zoning or regulation.

This appeal followed.

SUMMARY OF ARGUMENT.

First: this Court's settled precedents are clear that allegations of takings give rise to issues of fact, that call for resolution on the merits, and do not lend themselves to disposition on the pleadings. This settled rule has gained much force from the Court's more recent commitment to an avowedly *ad hoc*, highly fact-

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[2]However, when the California Supreme Court considered the validity of the zoning under the second cause of action for declaratory relief, it stated, in contradiction of the allegations of the Complaint, that the ordinance on its face purported to give some economic use to their property. The Court ignored the allegation of the Complaint that, as applied to their property the zoning was confiscatory.

dependent case by case approach to cases of this type. The trier of fact must be permitted to hear evidence and draw factual inferences, because economic or physical reality may contradict the availability of uses purportedly permitted by the challenged regulation.

Second: the decision below rests on a misunderstanding of the nature of governmental power to deal with private property. The power to take is an inherent attribute of sovereignty that operates independently of the Constitution which, insofar as pertinent here, only imposes the limitation that just compensation be paid. The government may take private property by condemnation, seizure or legislation—intentionally or inadvertently. Whether a taking has occurred is then determined from the effect on the property, not by looking to subjective governmental intent. But however the taking is accomplished, it is neither "lawful" nor "wrongful"; it is but an exercise of an inherent power of sovereignty. If the taking is for a purpose legislatively authorized, whether expressly or by implication, the courts do not pass on the wisdom of the legislature in either setting a policy goal or in its choice of means; they award just compensation.

In the case at bench, the California Legislature authorized acquisition of private property for open space purposes and expressly forbade such acquisition without just compensation for any ensuing taking or damaging. Thus, no sound constitutional basis exists for holding such exercise of peculiarly legislative prerogatives to be invalid.

Third: the substantive criteria of a non-physical taking, enumerated by this Court in *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104,

124 *et seq.* (1978) and in *Kaiser Aetna v. United States,* ..... U.S. ..... [100 S.Ct. 383, 390] (1979) are met here. Not only is the alleged impact on the landowners totally confiscatory and their reasonable investment-backed expectations frustrated, but also the regulation in question effects a governmental acquisition of open space land resources. Moreover, this record is replete with extensive and overt governmental acquisitory purpose and conduct aimed at the transformation of this private land into "open space" declared by the legislature to be a public purpose supporting the exercise of eminent domain upon payment of just compensation.

Fourth: settled law and sound, historically-rooted policy favor awarding just compensation as a judicial remedy for taking of private property. In all cases in which the issue of remedies arose, this Court so held. Beyond that, powerful policy reasons continue to favor such an approach. The remedy of invalidation would require the courts to determine on an ongoing basis what legislatures may or may not enact; an approach violative of the historical view of the judicial invalidation power as one of strict necessity to be invoked only where unavoidable. Beyond that, such an approach would put the courts in a position of having to strike down potentially vital governmental programs of far-reaching importance, with potentially calamitous consequences if such programs were found to trench on protected property rights of even one citizen, without compensation.

Moreover, the remedy of just compensation leaves the regulating entity with a variety of economically ameliorative responses. The regulations can be amended to eliminate the objectionable features, or the entity may acquire such rights, and only such rights of the

[former] owner as are necessary to the carrying out of the governmental purpose. Even in the cases of the most egregious constitutional violation, where governmental disregard of the rights of the property owner is so severe as to work a complete taking, the governmental entity acquires a valuable resource for its payment of "just compensation", which leaves its balance sheet unchanged. Such entity has the further option of reselling the land so acquired for uses compatible with its regulatory purposes.

Finally, land use regulations in some regions of the country have grown so complex and multi-tiered that invalidation becomes literally or economically impossible, particularly where—as in California—the regulation can be changed at any time, even after the owner has established his right to proceed with the use of his land under the old regulation. California courts, moreover, simply refuse to invalidate any land use regulation, no matter how egregious; there have been no reported invalidation cases (on grounds of taking) in that state for almost two decades, and the most recent case on point erects well nigh insurmountable litigational barriers that preclude even an inquiry into the regulatory entity's bad faith in enacting the complained-of regulation.

ARGUMENT.

1.

SETTLED LAW AND THIS COURT'S COMMITMENT TO A HIGHLY FACT-DEPENDENT CASE BY CASE APPROACH TO INVERSE CONDEMNATION CASES MILITATE IN FAVOR OF A STRONG POLICY FAVORING TRIALS OF CLAIMS OF TAKINGS ON THE MERITS.

This Court's adherence to deciding inverse condemnation cases on an *ad hoc,* case by case basis, with decisions heavily dependent on the facts and factual inferences of each controversy, is now well established. *United States v. Central Eureka Mining Co.,* 357 U.S. 155, 168 (1958); *Goldblatt v. Hempstead,* 369 U.S. 590, 594 (1962); *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 123-124 (1978); *Kaiser Aetna v. United States,* ..... U.S. ..... [100 S.Ct. 383, 390] (1979). Also see, *Andrus v. Allard,* ..... U.S. ..... [100 S.Ct. 318, 327] (1979) (resolution of taking claims ultimately calls as much for the exercise of judgment as for the application of logic).

Thus, it seems only fair that an aggrieved property owner faced with having to make out a case for relief against so uncertain a standard, should be allowed his full day in court to prove his case. This Court has repeatedly so held: *Cuyahoga River Power Co. v. Akron,* 240 U.S. 462 (1916); *Mosher v. Phoenix,* 287 U.S. 29 (1932). Both *Cuyahoga* and *Mosher* made it clear that in order to determine whether a plaintiff who claims an uncompensated taking of his property can make out a case for relief, it is necessary for the trial court to take jurisdiction of the case and try the matter on the merits (240 U.S. at 464, and 287 U.S. at 32).

Of particular interest on this point is *Portsmouth Harbor L. & H. Co. v. United States,* 260 U.S. 327 (1922), for there the Court was presented with the claim of a plaintiff who twice before sued, claiming a taking, only to be rebuffed by this Court both times (see 260 U.S. at 328). Nevertheless, since he alleged new facts tending to show a governmental purpose to subordinate his land to the government's use of a nearby naval gun battery, he was held entitled to a trial on the merits. Said Mr. Justice Holmes, speaking for the Court's majority:

> "As we have said, the intent and the overt acts are alleged, as is also the conclusion that the United States has taken the land. That we take to be stated as a *conclusion of fact,* and not of law, and as intended to allege the actual import of the foregoing acts. In our opinion the specific facts set forth would warrant a finding that a servitude has been imposed," 260 U.S. at 330, emphasis added.

It is important to note that the Court went on to observe that the plaintiff's evidence might not be capable of proving their allegations, but it was not proper to ". . . pronounce it impossible upon demurrer." *Id.*[3] In the case at bench the allegations are that the challenged regulation deprived Appellants' property of all value and utility. That is a charge heavily dependent on factual evidence (including expert testimony by engineers, appraisers and land economists). Such issues

[3]The soundness of that observation is illustrated by *Cordeco Development Corp. v. Vazquez,* 354 F.Supp. 1355 (1972, D.P.R.) where a claim for relief under a taking theory was properly stated, but evidence eventually disclosed that changing economic conditions undid the monetary harm: *Id.,* 539 F.2d 258, 260-261[3] (1976, 1st Cir.).

do not lend themselves to rational resolution by demurrer; they call for trial on the merits.

In sum, fairness to the party bearing the burden of proof, logic and this Court's decisions, support the policy that all doubts ought to be resolved in favor of permitting an aggrieved landowner to have his day in court and be afforded a fair chance to prove a taking of his property before a trier of fact.

2.

THE EMINENT DOMAIN POWER OPERATES AS AN INHERENT ATTRIBUTE OF SOVEREIGNTY; ITS EXERCISE AND COMPENSATORY ATTRIBUTES ARE NOT DEPENDENT ON A PRIOR DETERMINATION OF ANY "WRONGFULNESS" OR "LAWFULNESS" OF ITS EXERCISE.

The Fifth Amendment does not forbid or authorize takings, for they are but a manifestation of the inherent power of the sovereign. The Constitution only imposes limitations. *Mississippi & Rum River Boom Co. v. Patterson,* 98 U.S. 403, 406 (1878); *Nichols on Eminent Domain,* Vol. 1, §1.14[2]. Nor does the Constitution require that the taking power be exercised in any particular fashion; the taking may be effected by condemnation proceedings, *by legislation*—directly or by implication[4] (see *United States v. Lynah,* 188 U.S. 445, 465-466 (1903)), or simply by naked seizure. But whichever way the power is exercised, it is a taking

[4]Legislation may work a taking intentionally (see, *e.g., Rocca v. United States,* 500 F.2d 492, 496 (1974, Ct. Cl.); compensation awarded where a taking occurred by ". . . an act of Congress itself whereby Congress declared that . . . the United States was immediately vested with all right, title and interest in real property . . ." within designated boundaries), or it may work a taking inadvertently, as in *The Regional Rail Reorganization Act Cases,* 419 U.S. 102 (1974). Also see *Lynch v. United States,* 292 U.S. 571, 579 (1934).

and, as an act of inherent power of government, it is *not* wrongful or tortious; the government may do just that (*United States v. Dow,* 357 U.S. 17, 21 (1958). In such situations the aggrieved owner's remedy is an inverse condemnation action. *United States v. Dow, supra, Buffalo River Conservation v. National Park Service,* 558 F.2d 1342, 1344 (1977, 8th Cir.), *Gardner v. Harris,* 391 F.2d 885, 887, 888, fn. 11 (1968, 5th Cir.). The fact that the governmental conduct, had it been engaged in by a private party, could have been branded as "wrongful" does not alter the fact that the government in such situations is only exercising its inherent power not possessed by private parties, and hence *it* is acting properly—subject, of course, to its constitutional obligation to pay just compensation for what it takes.

In other words, when the government takes property (*by whatever means*) it is a meaningless endeavor to engage in characterizations of its conduct as "wrongful" or "lawful". The concept is not unlike the inherent governmental war-making power; a particular war may be the proper subject of moral debate as "just" or "unjust", as "defensive" or "aggressive", but however characterized, the point is that it is up to Congress to declare war and once it exercises that inherent power that is entrusted to it, such characterizations have no impact on its legality. It is a political question, and so is the exercise of the taking power; see, *Rindge Co. v. County of Los Angeles,* 262 U.S. 700, 709 (1923). The point at bottom is that one deals here with an inherent

governmental *power* (whose exercise has been entrusted to the legislature),[5] and therefore, when a taking occurs, the question is whether just compensation has been paid.

The point is splendidly made by *Tektronix, Inc. v. United States,* 552 F.2d 343 (1977, Ct. Cl.). There, the government engaged in what among private parties would undoubtedly be branded as an act of industrial piracy; it brazenly proceeded to have copied for itself a superior electronic device in order to spare itself the need of having to pay its inventor the premium that its superior quality commanded in the market. In so doing, the government infringed several patents (see *Tektronix, Inc. v. United States,* 445 F.2d 323 (1971, Ct. Cl.) for the factual background). Yet, what in other circumstances would have been a tort (and might well have engendered a claim for punitive damages) was here simply a governmental taking of the patents, and the aggrieved inventor-manufacturer was held entitled to "just compensation" measured as in any other taking (see 552 F.2d at 347), rather than by loss of profits which might have been recoverable in a tort action

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[5]In the case at bench this point need not be debated, because the California Legislature expressly endorsed the creation of open space as a desirable social policy (see *Berman v. Parker,* 348 U.S. 26 (1954)), and has authorized its acquisition by eminent domain. See Cal. Gov't. Code §§6950, 6952, 6953. Indeed, the California Legislature went out of its way to direct that these statutes *not* be applied so as to work a taking or damaging without payment of just compensation. See Cal. Gov't. Code §65912. Thus, that the City of Tiburon may take private property for public use, and that open space is one species of such legislatively declared public use, cannot be the subject of rational debate in the case at bench.

against a private party (see 552 F.2d at 349-351). Thus, a major error of the court below lies in its unsupported and unwarranted assertion that the taking power is exercised either properly or wrongfully, and its conclusion that it is only in the former case that "just compensation" is awarded, whereas in the latter case the governmental act can only be declared invalid (see J.S.A. 5).

The court below, in a sweeping statement (*Id.*) devoid of either examination of precedent or analysis, purported to find a distinction between a wrongful transgression of the taking clause (*i.e.*, one that ". . . may exceed constitutional limits . . .") and something which it called ". . . lawful taking of property. . ." (*Id.*). As the preceding discussion shows, such a distinction is illusory. The "constitutional limits" are exceeded not because the regulation works a taking —"lawful" or otherwise—but because it works a taking without compensation. It is the lack of compensation that offends the Constitution, not the taking.

As this Court has repeatedly stressed, the subjective "intention" of the taking entity is of no moment; in the words of Mr. Justice Stewart: ". . . The Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does*" (*Hughes v. Washington,* 389 U.S. 290, 298 (1967) emphasis in the original). Accord, *Davis v. Newton Coal Co.*, 267 U.S. 292, 301 (1925): "The incantation pronounced at the time is not of controlling importance; our primary concern is with the accomplishment."

The full dimension of that error below is readily demonstrated. To begin with, the short answer is that this Court's authoritative analysis in *Kaiser Aetna v.*

United States, ... U.S. .... [100 S.Ct. 383] (1979) is to the contrary. There the Court first inquired as to whether a regulatory power existed, and whether it was properly exercised by the Congress. Having then concluded that the answer was affirmative, the Court went on to make the further inquiry whether the *proper* exercise of this *proper* power nonetheless worked a taking by reason of its impact on the regulated property (see 100 S.Ct. at 390-393). Accord, *Regional Rail Reorganization Act Cases,* 419 U.S. 102 (1974). This is precisely the rationale of the California case of *Eldridge v. City of Palo Alto,* 57 Cal.App.3d 613, 129 Cal.Rptr. 575 (1976) which the court below erroneously overruled in the case at bench. (see J.S.A. 6). In other words, the fact that a regulation works a taking does not make it any less "lawful".

Second, the error of the court below lies in its none-too-tacit premise that it is the function of the judiciary to rescue the legislative branch of the government from the natural consequences of its own unwillingness to confront and assess the probable constitutional and economic effects of its intentional and deliberately arrived at decisions. The fallacy embraced by the court below seems rooted in its uncritical acceptance of polemical commentaries (see J.S.A. 11-12) that evidence a complete misunderstanding of the nature of inverse condemnation, by asserting that just compensation should not be payable when the taking is accomplished inadvertently.[6] Such assertions miss the mark

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[6]One of those commentators' additional assertion that such judicial rescue operations are particularly appropriate in the case of measures adopted by initiative, scarcely warrants serious response. When the people exercise that power they engage

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because in most cases of inverse condemnation the taking is "inadvertent"; when the government takes property advertently, it files eminent domain proceedings, and volunteers just compensation—at least it is supposed to do so (42 U.S.C. §4651, Cal. Gov't. Code §7267.6). The business of the United States Court of Claims is in large measure composed of cases in which the government vigorously denies that any intended taking occurred; yet in many such cases, it learns that whether advertent or inadvertent, a taking requires payment of just compensation, not because it is convenient or conceded, but because the Constitution commands it. As one noted commentator observed, the constitutional guarantee is not limited only to those situations where the taking is cheap or easy but, on the contrary, the need to compensate is greatest where the loss is greatest. Stoebuck, *Condemnation of Rights the Condemnee Holds in Lands of Another*, 56 Iowa L.Rev. 293, 307 (1970).

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in the basic governing process of a democratic society (*James v. Valtierra*, 402 U.S. 137 (1971)). There is no question that they may exercise their power as to land uses (*City of East Lake v. Forest City Enterprises*, 426 U.S. 668 (1976)). With that as a premise, can it be that when the people go to the polls without any of the resources and safeguards of a legislature (such as committee studies and hearings, consultation of experts and legal counsel, etc.), fortified only with electioneering rhetoric, they somehow acquire a greater power to strip their fellows of their constitutionally protected rights, with less adequate redress available to the victims?!! Appellants suggest that such pseudo-populist rhetoric strikes at the heart of the concept of *ordered* liberty; "the people", no more than their elected representatives, have a valid claim to the illusory benefit of a "free lunch"; nor do they have any greater claim to disregard of constitutional limitations. "The people" are the ultimate repository of governmental power (*M'Culloch v. Maryland*, 4 Wheat. 316, 404-405 (1819)); it is *they* who bound themselves by the Constitution, and until such time as *they* choose to change it, no reason appears why it should not be respected.

In sum, when the government sets out to govern, it exercises an awesome power for which it is accountable. The Constitution and the noble policy it enshrines, permits no less—whether accomplished overtly or by indirection.[7]

3.

APPLICATION OF SETTLED CRITERIA OF INVERSE CONDEMNATION LAW TO THIS RECORD ESTABLISHES THAT A TAKING OF PROPERTY HAS BEEN ALLEGED, AND ACCORDINGLY, REVERSAL WITH REMAND FOR A TRIAL ON THE MERITS IS CALLED FOR.

The intellectual thread that unites the case law established by this Court, is its focus, not on the simplistic notion of physical "property" being "taken" by physical seizure,[8] but on the inquiry of whether property rights

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[7]Since cases of this type are so heavily fact-dependent, it cannot be overemphasized that here the City (aided by noted expert consultants) determined that it must acquire the subject property, filed eminent domain proceedings seeking to do so, and only when faced with having to pay for what it thus consciously chose to acquire, resorted to the indirection of the "regulatory" scheme in issue here. However, that the legislatively authorized taking was thus semantically disguised, does not make it any less a taking:

> "What cannot be done directly because of constitutional restriction cannot be accomplished indirectly by legislation which accomplishes the same result. . . . Constitutional provisions, whether operating by way of grant or limitation, are to be enforced according to their letter and spirit, and cannot be evaded by any legislation which, though not in terms trespassing on the letter, yet in substance and effect destroy the grant or limitation." *Macallen v. Massachusetts*, 279 U.S. 620, 629 (1929).

[8]It may be noted in passing that the assessment of the physical "takings" notion by legal commentators has been withering: "anachronistic" and "outmoded", Van Alstyne, *Taking and Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 So. Cal. L. Rev. 1, 2, fn. 5; "primordial", Stoebuck, *Condemnation by Nuisance: The Airport Cases in Retrospect and Prospect*, 71 Dickinson L. Rev. at 210; "primitive",

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have been destroyed by governmental acts said to work the "taking". The classic case of *Pumpelly v. Green Bay Canal Co.*, 13 Wall. 166 (1872), makes the point well. Even though the instrument of the taking in that controversy was physical (*i.e.*, flooding), the Court did not rest its decision on that fact, but analyzed the controversy in terms of deprivation of the owner's right of user. The *Pumpelly* analysis found further expression in a series of subsequent cases that involved takings in the absence of physical intrusion or, in the face of such intrusion, focused nonetheless on the impact on the affected property rights: *Richards v. Washington Terminal Co.*, 233 U.S. 546 (1914) (intense air pollution so deprived land owner of use and enjoyment of his property as to work a taking); *Portsmouth Harbor etc. Co. v. United States, supra,* 260 U.S. 327 (claim of subordination of private land to governmental gunnery activities on a nearby parcel stated a cause of action in inverse condemnation); *United States v. Causby,* 328 U.S. 256 (1946) (flight of governmental aircraft so interfered with use of the affected land surface as to work the taking of an easement).

Of particular significance are cases in which (as at bench) the taking was effected by legislative acts:

Beuscher, *Notes on the Integration of Police Power and Eminent Domain by the Courts: Inverse Condemnation,* in J. Beuscher and R. Wright, Land Use, 728 (1969); "antideluvian" and "troglodytic", Berger, *To Regulate or Not to Regulate?—Is That The Question?,* 8 Loyola L.A. L. Rev. 253, 258-259 (1975). These harsh judgments seem amply justified; we have come quite a way from livery of seisin, and no sound reason supports its reincarnation in this field. Of course, as this Court noted in *Penn Central,* the presence of a physical invasion results in a more ready judicial finding of a taking (438 U.S. at 124), but that is not a requirement (438 U.S. at 122, fn. 25).

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (prohibition of coal extraction deemed its taking); *Lynch v. U.S.,* 292 U.S. 571, 579 (1934) (legislative abrogation of contractual rights constitutes a taking); *U.S. Trust v. New Jersey,* 431 U.S. 1, 29, fn. 27 (1977) (legislative abrogation of bond indenture provisions constitutes a taking of bondholders' rights).

Yet another type of situation arose in *Armstrong v. United States,* 364 U.S. 49 (1960) where a governmental act of contractually possessing unfinished ship hulls worked an effective extinguishment of intangible rights (*i.e.*, materialmen's liens), and this too was deemed a taking.

What emerges from this Court's analysis is the twofold principle that (a) a "taking" consists of the deprivation of the former owner of his property rights (*United States v. General Motors, Inc.,* 323 U.S. 373, 378 (1945), and (b) in making a determination of whether such deprivation has occurred, one needs to consider several factors of "particular significance" (*Penn Central,* 438 U.S. at 124). Based on this Court's distillation of these factors in *Penn Central* and in *Kaiser Aetna v. United States, supra,* 100 S. Ct. at 390 *et seq.*, it appears that the following criteria of a taking are present here:

(a) *Economic impact on the owner* (438 U.S. at 124). The allegations at bench are that the large-lot zoning involved here,[9] has deprived the subject property of all utility and value. This is clearly in the nature of a

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[9]See *Appeal of Kit-Mar Builders,* 268 A.2d 765 (1970, Pa.); *Sanfilipo v. County of Santa Cruz,* 415 F.Supp. 1340 (1976, N.D. Cal.); *Arastra Limited Partnership v. City of Palo Alto,* 401 F.Supp. 962 (1975, N.D. Cal.), opinion vacated by stipulation following settlement, 417 F.Supp. 1125.

compensable taking since no criminal or anti-social activity is sought to be suppressed here.[10] In other words, where the activity proscribed by the regulation is criminal or has been determined to be a threat to public health or safety, property used in its pursuit may be outlawed or even confiscated and physically destroyed, without compensation; this is the so-called "noxious use" theory which is based on the premise that there is no property right in maintaining a nuisance or in engaging in a criminal activity (*e.g., Mugler v. Kansas,* 123 U.S. 623 (1887)). But when the use of private property does not involve such overtly anti-social activities, the regulation must be reasonable. *Nectow v. Cambridge,* 277 U.S. 183 (1928). The point is well made in *Kaiser Aetna v. United States, supra*; there the Court found that the government did have regulatory authority over the Hawaii Kai Marina, but could not exercise it so as to deprive the owner of a property right. On the other hand, suppose that the marina had been a threat to navigation; is there any question that the government could then take whatever steps were necessary to abate the hazard, even if it meant shutting down the marina? See *Pennsylvania v. The Wheeling etc. Bridge Co.,* 13 How. 518 (1851). Directly on point is *Pennsyl-*

[10]Compare *Mugler v. Kansas,* 123 U.S. 623 (1887) (prohibition statutes' destruction of value of a brewery upheld on the grounds of legislative interdiction of a grave social evil); *Hadacheck v. Sebastian,* 239 U.S. 394 (1915), and *Reinman v. Little Rock,* 237 U.S. 171 (1915) (banning of nuisance-like activities in densely populated areas upheld).

vania Coal Co. v. Mahon, supra, 260 U.S. 393, and particularly its discussion at 415-416, concluding that where the economic burden of regulation falls onerously on the regulated owner, a taking results under the principle of social cost distribution (accord, *Armstrong v. United States, supra,* 364 U.S. at 49).

(b) *The owner's reasonable expectations* (438 U.S. at 124-125, and 100 S. Ct. at 390). There is nothing here to suggest that the owners' expectations were anything but reasonable; no collision with any paramount proprietary rights of the government are involved here (*cf. Penn Central,* 438 U.S. at 125). Appellants bought residentially zoned land in a residential area (that remains such even now). No incompatibility of land uses is involved (compare *Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926)).

(c) *A state tribunal's reasonable conclusion that police power objective of health, safety and morals would be promoted by prohibiting particular contemplated use of land* (438 U.S. at 125).

This point is clearly in Appellants' favor; there is no "reasonable conclusion" by a state tribunal on this record. Indeed, Appellants were not afforded their day in court before such a tribunal, and that fact alone calls for reversal. Moreover, if the Constitution and this Court's precedents are to be accorded any weight, it cannot be "reasonable" for any lower tribunal to say that ostensible "regula-

tion" that deprives the regulated property of *all* use and value passes constitutional muster (see authorities collected in *Penn Central,* 438 U.S. at 127-128).

(d) *Governmental actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions* (438 U.S. at 128).

This element is manifestly present here and strongly favors Appellants' cause. The California Legislature was explicit in its findings of a public purpose inherent in the creation of open space resources (Cal. Gov't. Code §§6952, 6953, 65561, and 51097). Not content with these declarations of policy, the Legislature also spelled out its avowed intent to facilitate the acquisition of such public resources "*by purchase*, gift, grant, bequest, devise, lease *or otherwise*"[11] (Cal. Gov't. Code §6950 and §51097, emphasis added), and went on to authorize the expenditure of public funds for such acquisitions (Cal. Gov't. Code §6953). Finally, to leave absolutely no doubt as to its intent, the Legislature provided that its enactments are not to be construed as permitting the accomplishment of these public resource acquisition goals by adoption of ordinances in a manner that take *or dam-*

[11]Please note that such legislative language is deemed an authorization to acquire by means of steps taken by officials of the taking entity prior to formal vesting of title by expropriation. *Drakes Bay Land Co. v. United States,* 424 F.2d 574, 584 (1970, Ct. Cl.).

age[11a] private property for public use without the payment of just compensation (Cal. Gov't. Code §65912).

In short, what is involved here is an authorized *acquisition* of a public resource of a park-like nature (see Cal. Gov't. Code §6954, defining "open space" in language that can leave no doubt on this score); this is not "regulation".

Prolongation of the above analysis and detailed dissection of language contained in the various cases seems unnecessary. This Court's analysis in *Penn Central* speaks for itself.

In the case at bench, however, there are present certain additional factors of a factual nature that were not present in the cases heretofore decided by this Court. Harking back to the element of governmental "actions that may be characterized as acquisitions of resources" (438 U.S. at 128), it appears that (insofar as Appellants' knowledge and research indicate) the case at bench presents this Court with the plainest (if not most egregious) record of governmental acquisitory purpose pursued in the guise of regulation, ever considered on the merits. This record is simply overwhelming.

To begin with, Appellee did not act hastily or casually; rather, as far back as 1972, Appellee engaged the services of renowned consultants (Dean Witter & Co., Inc.) to prepare a financing plan *for open*

[11a]California is one of the States whose Constitutions provide for just compensation for damaging as well as for taking of private property; see Cal. Const., Art. I, §19.

space acquisition. (J.A. 6) The plan was duly prepared; it recommended acquisition to be financed by a municipal bond issue, and identified the specific properties to be acquired, including the subject property. (J.A. 6) Not content with that, Appellee also hired another consulting firm (Williams & Mocine) and had it prepare its Open Space Plan. This plan likewise specifically included the subject property and designated it as "indispensable to and necessary for the open space program". (J.A. 7) It went on to recommend that this property be "forthwith purchased". (J.A. 7) The City then went on to adopt a formal resolution authorizing condemnation of the subject property and indeed filed eminent domain proceedings (J.A. 9-10) which were later abandoned. (J.A. 10-11) Yet, even as the condemnation proceedings were being readied and prosecuted, Appellee was drafting and formally adopting the instant ordinance purporting to "regulate" private uses of the subject property, thereby raising doubts as to the *bona fides* of its conduct.[12]

Appellants are not to be understood as suggesting that legitimate public planning of *possible* acquisition of land should lead to liability. Appellants' point is that planning is one thing, but implementation of the de-

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[12]The condemnation resolution was adopted on October 25 and 26, 1973 (J.A. 9); the eminent domain action was filed six weeks later, on December 4, 1973 (J.A. 10) and abandoned almost a year later, in November, 1974 (J.A. 10).

And yet, on June 28, 1973, Appellee adopted Ordinances 123 N.S. and 124 N.S. (J.A. 6) purporting to regulate uses of land which Appellee's consultants earmarked for acquisition "forthwith", and on which Appellee then went on to file a condemnation action. Surely, a reasonable mind would be amply justified in drawing the inference that the "regulation" of land which was about to be condemned was a device intended to stultify all reasonable use to facilitate the acquisition, directly or indirectly.

cision to acquire, that emerges from that planning is quite another. When the planning is done, when the decision to acquire is arrived at, when the funds with which to pay for the acquisition are appropriated, and the "indispensable" place of the subject property in the municipal scheme of land ownership is proclaimed *urbi et orbi* (with predictably disastrous private market sequelae), and when an actual condemnation action is filed, that isn't any "planning"—that is acquisition, plain and simple. Moreover, that ostensible regulation is used in the process of facilitating such acquisition, does not make it any less an acquisition. In short, on this record, there is ample room for the drawing of the factual inference that wholly aside from its confiscatory effect *per se,* the regulation in question was conceived as an aid to acquisition, which is an illegitimate exercise of the police power, as held by the vast majority of American jurisdictions, ever since the seminal decision of *Forster v. Scott,* 32 N.E. 976 (1893, N.Y.).

If the City's conduct is not overtly acquisitory (short of formal expropriation of title), then it would be difficult to conceive of one; see *Benenson v. United States,* 548 F.2d 939 (1977, Ct. Cl.). *Drakes Bay Land Co. v. United States,* 424 F.2d 574 (1970, Ct. Cl.). These facts permit, if not compel, the inference that having confronted the value of the land it had decided to acquire, Appellee chose to try the "shorter cut" (*Pennsylvania Coal Co. v. Mahon, supra,* 260 U.S. at 416). In so doing, Appellee has provided this Court with a vivid illustration of the concerns of Mr. Justice Holmes, when he observed that:

> "The protection of private property in the 5th Amendment presupposes that it is wanted for public use, but provides that it shall not be taken

for such use without compensation. A similar assumption is made in the decisions upon the 14th Amendment. . . . When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States." *Pennsylvania Coal Co. v. Mahon, supra*, 260 U.S. at 415.

What Appellee was doing here, from beginning to end, was *acquiring*—not regulating—property. Having done what it did, and having in the process destroyed the utility and value of the subject property,[13] it should not now be heard to argue that it was merely "regulating" (of course, even on that unsound premise, Appellee's argument fails because of the "regulation's" total destruction of utility and value).

[13]As is no doubt judicially noticeable (and surely subject to proof on the merits) the kind of municipal maneuverings displayed here do not go without notice in the marketplace. Once the City repeatedly proclaims its commitment to retention of the subject property as "indispensable" open space, and this bit of news (together with the on-again, off-again condemnation) gets around the local market, what reasonable person would be expected to buy the subject property for anything remotely resembling its fair value, or at all? See Hagman and Misczynski, *Windfalls for Wipeouts*, at 222 *et seq.* (1978). For a graphic insight into what happens to the marketability and utility of private property earmarked for condemnation see *Madison Realty Co. v. City of Detroit*, 315 F.Supp. 367, 371 (1970, E.D. Mich.) and *Drakes Bay Land Co. v. U.S., supra*, 424 F.2d at 586. Similar economic calamities can befall the landowner in such cases, even though the contemplated condemnation is eventually abandoned; see *Washington Market Enterprises, Inc. v. City of Trenton*, 343 A. 2d 408 (1975, N.J.); *Jones v. People*, 22 Cal.3d 144, 148 Cal.Rptr. 640, 583 P.2d 165 (1978). "It is one thing to have the sword of condemnation resting available but unpointed in the governmental sheath. It is another to have it suspended like that of Damocles directly above one's property", *Halpert v. Udall*, 231 F.Supp. 574, 579 (1964, S.D. Fla.) (Choate, J., concurring), aff'd. per curiam, 379 U.S. 645.

In sum, adhering to the criteria of a non-physical taking compiled by this Court in *Penn Central* and *Kaiser Aetna*, Appellants' complaint alleges a taking and entitles them to a trial on the merits.

4.

SETTLED LAW AND SOUND POLICY MILITATE IN FAVOR OF ENDORSEMENT OF AVAILABILITY OF JUST COMPENSATION AS THE AGGRIEVED PROPERTY OWNER'S REMEDY.

A. This Court's Precedents Uniformly Support the Appropriateness of the Monetary "Just Compensation" Remedy in Taking Cases.

On the issue of remedies much confusion was engendered below by the observation that in *Pennsylvania Coal Co. v. Mahon, supra*, this Court did not award damages upon its findings of a taking (see J.S.A. 8). With the utmost respect to the Court below, the significance sought to be ascribed to such assertion does not withstand scrutiny. A clear conclusion emerges from a brief comparison of the contexts in which the early police power/taking cases reached this Court, with those cases in which the question of remedies for an uncompensated taking *was* presented. While this Court—faithful to its Article III (of the U.S. Constitution) function of deciding cases and controversies, rather than rendering advisory opinions (*cf. New York v. Illinois*, 274 U.S. 488 (1927))—concentrated on the question of whether a taking did or did not occur *when that was the sole issue tendered by the parties*, it also examined the question of remedies *when that was in issue*. Courts, after all, do not roam over the

political landscape in *sua sponte* pursuit of comprehensive remedial schemes transcending the cause of the parties before the bench; see *Adkins v. Children's Hospital*, 261 U.S. 525, 544 (1923).

A review of the decisional law speaks for itself. *Mugler v. Kansas, supra,* and *Hadacheck v. Sebastian,* 239 U.S. 394 (1915), both were presented in the context of *habeas corpus* proceedings; the regulated owners in those cases disregarded the regulations and each sought to defend the ensuing prosecution on the grounds that (for the constitutional reasons advanced by them) the criminal charge was improper. Likewise, in *Goldblatt v. Town of Hempstead,* 369 U.S. 590 (1962) the owner disregarded the regulation, except that there the regulating entity sought to enjoin his activities. Similarly, in *Kaiser Aetna v. United States, supra,* the government sued the owner, seeking declaratory and injunctive relief (see *United States v. Kaiser Aetna,* 584 F.2d 378, 380 (1978, 9th Cir.). In *Euclid v. Ambler Realty Co., supra,* and *Reinman v. Little Rock, supra,* the owners sought injunctions to restrain the enforcement of the regulations. In *Nectow v. Cambridge,* 277 U.S. 183 (1928); *Welch v. Swasey,* 214 U.S. 91 (1909); *Zahn v. Board of Public Works,* 274 U.S. 325 (1927) and *Gorieb v. Fox,* 274 U.S. 603 (1927) the regulated owners sought to mandate the issuance of building permits notwithstanding the existence of the challenged regulations. *Miller v. Schoene,* 276 U.S. 272 (1928), presented for review the correctness of a decision by a county court affirming a state entomologist's order to chop down the aggrieved owner's ornamental cedar trees. *Pennsylvania Coal Co. v. Mahon, supra,* deserves particular mention in light of its evident misapplication in the opinion below. *Pennsylvania Coal* involved litigation between two private parties (a land surface owner sued the mineral owner seeking to enjoin coal extraction under his land); the regulatory entity (*i.e.,* the State of Pennsylvania) was not even a party, and hence any award of damages against it would have been a jurisdictional impossibility.

In sum, in all these cases there was no claim to compensation, nor—insofar as can be ascertained—were there any pleadings before the Court giving rise to questions of inverse condemnation relief.

In all these cases the Court decided the issues before it, and refrained from indulging in improvident dicta concerning theoretical problems *not* before it. It was only in recent cases, that claims to just compensation began appearing.[14] In the two such cases to reach

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[14]The various reasons of law, logic, policy and practicality that favor the availability of just compensation as a remedy for takings, are discussed *infra.* One aspect of such matters, however, warrants mention here.

One thing veritably leaps out of the court reports in reviewing the above classic decisions: *in none of them* did the (sometimes gravely damaged) landowners seek damages; in the vein of sensible people, they sought to impose no burdens on the public purse, and only asked to be let alone to use their property free of what they conceived to be excessive regulation. Why then did this attitude decline in the 1970s? Surely, no epidemic of avarice suddenly erupted among members of America's land owning populace—at least no more so than it was always there. What happened is that mushrooming, onerous regulations, combined with growing judicial deference to the regulators (particularly in some regions, including California), have at long last begun to produce situations where anything but a monetary remedy is useless. But what was true throughout America's history is still true today: given any sort of reasonable choice, landowners would continue to opt in favor of using, enjoying and improving their land. If nothing else, those are far more satisfying and profitable endeavors than costly and uncertain litigation that at best leads to the often harshly restricted fair market value of their land, which would be the measure of their recovery

(This footnote is continued on next page)

this Court thus far (*Penn Central Transportation Co. v. City of New York, supra,* and *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* ..... U.S. ..... [59 L. Ed. 2d 401] (1979)) the availability of the just compensation remedy was not even questioned. Indeed, in *Lake Country Estates* this Court went out of its way to satisfy itself preliminarily that a cause of action had been stated (see 59 L. Ed. 2d at 408), and went on to give liberal interpretation to the remedial scope of 42 U.S.C. §1983 (*Id.* at 409).[15] Of particular significance in that decision is the discussion at 59 L. Ed. 2d at 409, including footnote 11 (containing the 9th Circuit's pleading analysis and its conclustion that a cause of action in inverse condemnation had been stated), at the end of which the Court assumed the adequacy of those allegations (*Id.* at 408) and went on to conclude: "In this case, we need not even reach the Bivens question to conclude that *there is* both *a cause of action* and federal jurisdiction." (*Id.*, emphasis added).

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in inverse condemnation cases and which would leave them uncompensated for a host of consequential losses, to say nothing of their loss of profits. In short, when landowners seek inverse condemnation damages, it is because they have been driven to this measure of last resort, *not* because they like the idea.

[15]While the court below decided the case at bench on the basis of the paramount authority of the Fifth Amendment (see J.S.A. 7), it follows that Appellants' cause also gives rise to a claim under §1983 which expressly creates liability ". . . in an action at law . . ." for deprivation of any rights, privileges, or immunities secured by the Constitution. That state courts are bound to enforce federal laws is no longer subject to debate (U.S. Const., Art. VI, cl. 2, *Testa v. Katt,* 330 U.S. 386 (1947)). Moreover, that property rights are within the scope of protection of §1983, likewise cannot be doubted in the wake of *Lake Country Estates, supra,* and *Lynch v. Household Finance Corp.,* 405 U.S. 538 (1972). See *Gordon v. City of Warren,* 579 F.2d 386 (1978, 6th Cir.).

With the preceding discussion as background, Appellants turn to review of those cases in which this Court *did* consider the issue of remedies. Here the case law is clear to the point of being overwhelming: Appellants' research discloses four such decisions directly on point.[16] *In every one,* this Court rejected arguments of parties seeking specific relief, and opted instead for inverse condemnation damages as the proper remedy of owners of taken property.

Both in terms of result and rationale, *Hurley v. Kincaid,* 285 U.S. 95 (1932), is well nigh dispositive. The Court's rejection of the owner's attempt to secure a nonmonetary remedy is both clear and logical. Of particular interest is the Court's reasoning that proceeds from the premise that the Act in issue there was valid[17] (285 U.S. at 103). Once that is established, the question becomes whether the owner's constitutional rights are protected when just compensation is provided, or whether the whole law must fall because of lack of compensation. Mr. Justice Brandeis' answer to that question in *Hurley* is difficult to quarrel with: the owner's grievance in such cases is *not* that the govern-

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[16]*Hurley v. Kincaid,* 285 U.S. 95 (1932); *Dugan v. Rank,* 372 U.S. 609 (1963); *Fresno v. California,* 372 U.S. 627 (1963); *Regional Rail Reorganization Act Cases,* 419 U.S. 102 (1974). Also, see *United States v. Gerlach Live Stock Co.,* 339 U.S. 725, 752-753 (1950) (taking effected by state police power measure gives rise to right to just compensation, even though invaded right not protectible by injunction).

[17]While in *Hurley* this was conceded (285 U.S. at 103) it is basic that validity of a law cannot be made dependent on a citizen's concession; the law derives its validity from legislative action that is compatible with the constitutional authority. Thus, in *Kaiser Aetna v. United States, supra,* the owner did not concede the law's validity, but in spite of vigorous argument, the Court found that the law was valid, even if its application at the hands of the U.S. Corps of Engineers would work a taking (100 S.Ct. at 390).

ment takes his land, but rather that the taking has not been accompanied by compensation. What then should the government do? Obviously, it should tender compensation or file an eminent domain action, to have it fixed by the court. It follows, therefore, that if that compensation is provided by the courts (whether at the government's or the owner's behest) the flaw in the governmental action is cured, and there is no illegality (see 285 U.S. at 104).

B. Court Decisions Favoring the "Just Compensation" Remedy Rest on Sound Reasons of Public Policy.

Nor did *Hurley* stop there; it went on to note:

> "Even where the remedy at law is less clear and adequate, where large public interests are concerned and the issuance of an injunction may seriously embarrass the accomplishment of important governmental ends, a court of equity acts with caution and only upon clear showing that its intervention is necessary to prevent an irreparable injury." 285 U.S. at 104, fn. 3.

That observation, of course, puts its finger on the heart of pertinent policy considerations: it would be most improvident to structure a remedial rule that would require the courts *as a constitutional imperative* to strike down potentially vital governmental programs or regulatory schemes, merely because they impacted on an affected property owner so as to deprive him of a "stick" in his property rights "bundle." *The Regional Rail Reorganization Act Cases, supra,* provide an excellent example of the hazards inherent in Appellee's theory. Had such a theory been applied there (as indeed it was by the trial court, only to be rejected by this Court) the upshot would have been an instant

destruction by the stroke of a judicial pen of a comprehensive congressional scheme, that would have left the most densely populated regions of the country without an effective rail transportation system, with no less than eight major railroads in the throes of fragmented, individual bankruptcy proceedings and without a coherent system whereby to consolidate and make optimally useful all of their combined resources, still needed to maintain a national rail transportation system.

To be sure, the case at bench does not present the Court with nearly such grave prospects, but that is just the point; the relatively unimportant (and self-inflicted) travails of what in fact is a small village in California should not serve as a vehicle for structuring a *constitutional* rule that in future application would require the judicial destruction of major national regulatory schemes that some day may be vital to national survival.[18] As Mr. Chief Justice Marshall enduringly put it:

> "The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those

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[18]This is no hyperbole. Surely, it takes no claim of clairvoyant powers to visualize various governmental regulatory responses to the difficult problems of energy and inflation, for example, that in application may trench on constitutionally protected property rights. Should that occur, which would be better public policy—to require the benefited public to pay only for those private rights destroyed in the process of thus bettering the public condition, or to declare such programs invalid, with possibly calamitous consequences? As the Court of Claims astutely noted in *Drakes Bay Land Co. v. U.S., supra,* 424 F.2d at 587, where the "convergent pressures" of desired governmental objectives and governmental unwillingness to pay for what is needed, impact on the property owner caught in the middle, it is recourse to inverse condemnation that ". . . has saved the day in many another sticky situation".

> who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confiding the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." *M'Culloch v. Maryland,* 4 Wheat. 316, 415 (1819).

Moreover, Appellee's thesis, that would have the courts invalidate legislative enactments on an ongoing basis, as the primary remedy, ignores the socio-political gravity of judicial intervention in the workings of a tri-partite government. When the judiciary invalidates a legislative enactment it is a measure of last—not first—resort. The judicial power to invalidate is a historically rooted power of "strict necessity" (*Rescue Army v. Municipal Court,* 331 U.S. 549, 568 (1947); *Spector Motor Service v. McLaughlin,* 323 U.S. 101, 105 (1944)), and is to be invoked only when "unavoidable" (*Alma Motor Co. v. Timken-Detroit Axle Co.,* 329 U.S. 129, 136 (1946)). An astute analysis of the mischief to the working of government, destabilization of laws, and indeed adverse impact on the judiciary, that would likely flow from too ready an invocation of the constitutional invalidation power was made by Mr. Justice Rutledge in *Rescue Army v. Municipal Court, supra,* 331 U.S. at 571-572. It is a policy of which it was said: "Time and experience have given it sanction. They also have verified . . . that the choice was wisely made" (*Id.* at 572).

Appellee's theory seems preoccupied with short-range provincial concerns of a small town's local interests. Its adoption by the court below ignores the grave strain that judicial invalidation of legislation imposes on the social fabric. The holding below improvidently fashions a rule that would have the judiciary impose constraints on what the legislature may or may not enact, not in the historical context of major, earth-shaking policy decisions that have confronted the nation on occasion and thereby made occasional legitimate claims on this Court's extraordinary power to invoke the organic law's grand scheme of checks and balances, but in terms of routine, day-in, day-out, case by case adjudications of purely local (often political) decisions involving what in national policy terms are but insignificant patches of land. Appellee's approach would make this Court the Supreme Board of Zoing Appeals.

Finally, legislative approaches to solution of social problems are inherently more flexible and democratic, and judicial delimitations of the legislative power should be created rarely and cautiously. It is the legislatures that are called upon to provide immediate responses to social needs of the moment, and legislators are more readily responsive and accountable to the public will. This is as it should be in a democratically based society. To impose on such a system of governance a process of *ad hoc* judicial intervention of a ". . . largely negative character and [with] limited resources of enforcement" (*Rescue Army v. Municipal Court, supra,* 331 U.S. at 571), would be most improvident. It seems by far the better policy to let the local legislators legislate, and when their enactments disregard the "just compensation" clause, and work a taking, it is

singularly appropriate that they—as the branch of government responsible for the public purse, both in terms of revenues and expenditures—should be called upon to face up to the consequences of their own informed decision making, and to pay for that (and only for that) which their solemn action took from a private owner. See *U.S. Trust Co. v. New Jersey, supra,* 431 U.S. at 29, fn. 27. In the long run, that approach is certain to enhance the quality of legislative cost/benefit analyses, and to provide incentives to local governmental entities' clear recognition of the distinction between municipal necessities, social amenities, and outright luxuries.[19] This is a sound policy for rich and poor alike; yet it must be noted that such considerations are *a fortiori* pertinent here, when one recalls that Tiburon is without a doubt one of the most affluent communities in the state (if not the country); it is already blessed with ample environmental resources, and can undoubtedly well afford any reasonable amount of parklands or "open space" for its well-heeled inhabitants.

In sum, sound, time-tested reasons of public policy respectful of the doctrine of separation of powers, coun-

[19]Every municipality needs transportation, and every one owns automobiles for that reason. Yet no one has ever suggested that a municipality should have the power to exact Cadillacs from local car dealers when the municipal budget only allows for Fords. No reason appears why similar reasoning should not apply to a municipality's real property needs and desires; as Mr. Justice Holmes observed in *Pennsylvania Coal Co. v. Mahon, supra,* 260 U.S. at 415, where a community has been so shortsighted as to fail to acquire enough for its needs [as determined by it], no reason appears why the courts should step in and supply the desired additional increment of social benefit gratis, any more than they supply any other community resources. Accord, *Griggs v. Allegheny County,* 369 U.S. 84, 89-90 (1962), (a community that constructs a bridge or airport without adequate approaches is not entitled to acquire them gratis by a claim that it is "regulating").

sel against the judiciary's, too-ready constitutional intervention in peculiarly local, often political, land use decisions on an ongoing daily basis. Legislatures know best what their constituencies need and what they can and cannot afford, and no sound reason appears why the courts should be called upon to assume a paternalistic role in this peculiarly legislative area of fiscal decision making.

C. Where a Regulation Works a Taking, the Presence of the "Just Compensation" Remedy Allows the Regulating Entity a Variety of Flexible Responses by Which to Lessen the Impact of the Adverse Judgment, While Preserving Optimal Regulatory Alternatives.

Beyond the above considerations, there are additional sound policy reasons that favor just compensation as a remedy.[20] If the regulating entity effects a taking and confronts monetary liability, it has several ameliorating options available to it. It can, for example, in those situations where a full irreversible taking has not been affected, amend the regulation so as to avoid the continuing constitutional violation, while preserving its proper regulatory objectives to an optimal degree. See *U.S. Trust Co. v. New Jersey, supra,* 431 U.S. at 29-30. In such cases, this will reduce the liability

[20]Not the least of which is the wholesome deterrent effect on would-be egregious violators of constitutionally protected rights; see *Bivens v. Six Unknown Federal Narcotics Agents,* 403 U.S. 388, 407-408 (1971) (Harlan, J., concurring). Absent such deterrent, see the appalling do-nothing attitude of municipal officials defying a corrective court order, once it was established that monetary recompense would not be required for a shocking taking of private residential land through gross pollution of water: *Ortega Cabrera v. Municipality of Bayamon,* 562 F.2d 91 (1977, 1st Cir.).

to payment of compensation for a temporary or partial taking. Even assuming the worst possible scenario from the regulating entity's point of view (*i.e.,* those situations where the courts find the invasion of private property rights to be so egregious as to work a complete taking), the municipality does not lose money, but rather acquires a valuable asset[21] whose acquisition axiomatically betters the public condition. Moreover, if the municipality should decide that the asset thus acquired is indeed beyond its means (or, more accurately, beyond its *willingness* to acquire), it would have the further option of changing its mind and selling the land thus involuntarily acquired.[22] Indeed, Cal. Gov't. Code §6953 expressly authorizes such resales.

Such considerations would further provide proper incentives for municipal fine tuning of regulations so as to meet at once the equally desirable goals of accomplishment of basic regulatory objectives (albeit possibly not to the degree that may be desired by community environmentalist zealots; see Frieden, "The Environmental Protection Hustle" (1979, MIT Press), *passim*), while still affording a measure of protection

[21]In other words, for its money, the municipality acquires its equivalent in the form of land whose price is judicially determined as being its fair market value.

[22]This idea is hardly novel. It is now authorized in cases of so-called excess condemnation, whereby under some circumstances a public entity condemns more land than it will use for the public project (see Cal. Code Civ. Proc. §1240.430). Such excess acquisition may occur because the government desires it (see *United States ex rel. TVA v. Welch,* 327 U.S. 546 (1946), *People v. Superior Court,* 68 Cal.2d 206, 65 Cal.Rptr. 342, 436 P.2d 342 (1968), or because the owner does (see Cal. Gov't Code §7267.7, 42 U.S.C. §4651(9)). Either way, resale of land acquired by the government is hardly unusual; indeed, such resale is an essential feature of urban redevelopment programs; see *Berman v. Parker,* 348 U.S. 26 (1954).

to the rights of the regulated (see *U.S. Trust Co. v. New Jersey, supra,* 431 U.S. at 29-30). In contrast, the kind of rule sought by Appellee, that would allow an irresponsible governmental entity to have a go at confiscatory regulation, without fear of meaningful adverse consequences save only an occasional judicial word of disapproval which might momentarily hurt the municipality's pride but leave it free to "regulate" anew (see *infra,* fn. 27), would be a positive disincentive to responsible governmental conduct. It would also act as an undue constraint on governmental efforts to experiment with novel regulatory schemes.[23]

Finally, a finding of monetary liability, subject to such fiscally ameliorative measures would have the wholesome effect of removing the crushing burden of delay and uncertainty from the afflicted landowners (see *e.g.,* the travails of the landowner in *William Haas Co. v. San Francisco,* 605 F.2d at 1117-1119 (1979, 9th Cir.)), while allowing the regulating entity a rational basis on which to assess, discount and forecast its exposure, and thereby reach informed and decisive cost/benefit conclusions when it sets out to impose onerous property regulations in pursuit of its democratically established social benefit goals.

[23]Such an approach would penalize the responsible regulatory entity whose well meaning but improvidently far-reaching regulations would be stricken down, forcing it into a whole new legislative effort with all the political and social turmoil that the re-creation of a legislative consensus so often entails (particularly in matters involving far-reaching novel regulations), while leaving the social problem unsolved. But, at the same time, such an approach would favor the irresponsible entity whose purpose was not so much the pursuit of social objectives by legitimate means, as it was to frustrate the regulated segment of society. See *infra,* fn. 27.

D. In Today's Regulatory Climate, Particularly in California, Invalidation of Regulations Is Virtually Unobtainable, and When Obtainable It Only Confronts the Owner With Other, and Usually Changing Regulations.

Traditional just compensation is also the better remedy pragmatically because in *today's* regulatory climate it often is the only one that can provide a relief *in fact*. Unlike the practice of a few decades ago when an aggrieved landowner could simply go to court and obtain a prompt and clear-cut judicial declaration of his right to put his land to reasonable uses, today's layer cake of regulations often makes that impossible, as a practical matter. Indeed, no less a proponent of expanded regulatory powers than Fred Bosselman (co-author of "The Taking Issue") astutely pinpointed the problem by raising this question: "Can our system of land use and environmental regulation become so Byzantine as to deny due process of law to the participants through the sheer complexity of the system?"[24] This is no idle concern; consider for example the shocking plight of the landowner in *William C. Haas & Co. v. San Francisco, supra,* 605 F.2d at 1118-1119, who found himself in a regulatory nightmare that ebbed and flowed for almost a decade, its salient feature being that no sooner did the owner make an effort to comply with the prevailing regulatory scheme, when it was changed, so that by degrees he was left with $1,900,000

[24]Address by F. Bosselman, ALI-ABA Land Planning and Regulation of Development Course, March 18, 1976; quoted in Hagman and Misczynski, "Windfalls for Wipeouts", at p. 12.

of his $2,000,000 reasonably made investment destroyed.[25]

The situation has become particularly acute in California. While at one time, California courts did intervene to protect landowners from arbitrary land use regulations, recent years have seen a development of a callous, if not positively hostile, attitude toward property rights. The last reported California case invalidating a land use regulation on grounds that it was confiscatory, is *Hamer v. Town of Ross,* 59 Cal.2d 776, 31 Cal.Rptr. 335, 283 P.2d 375 (1963). That was an end of an era; by then other California decisions had already served as harbingers of the message that in the coming brave new world California courts would indeed countenance total destruction of property rights; see *McCarthy v. Manhattan Beach*, 41 Cal.2d 879, 264 P.2d 932 (1953) (subject property singled out as the only "beach recreational district" in town, with all uses, save lifeguard towers, fences and small signs, prohibited); *Consolidated Rock Products Co. v. City of Los Angeles*, 57 Cal.2d 515, 20 Cal.Rptr. 638, 370 P.2d 342 (1962) (under existing zoning, property

[25]Appellants mean to stick to their own case, and do not intend to debate here in detail the merits of the *Haas* substantive ruling which—they observe in passing—was plainly erroneous. While this Court, ever since *Nectow v. Cambridge, supra,* has consistently adhered to the concept that a regulatory destruction of a landowner's reasonable, investment-backed expectations is tantamount to a taking, the *Haas* court, with a stroke of its pen, nullified this Court's decisions, through the semantic expedient of re-labelling such destruction as "diminution in value", and then rubbed salt in Haas' wound by charging that his adherence to this Court's doctrine was an attempted "recharacterizing" of the "diminution in value" (605 F.2d at 1121).

rendered completely worthless but no relief granted). Before too long, the California land regulatory climate produced such appalling decisions as *Avco Community Developers, Inc. v. South Coastal Regional Commissions,* 17 Cal.3d 785, 132 Cal.Rptr. 386, 553 P.2d 546 (1976), cert den. 429 U.S. 1083 (land developer who in full compliance with local county regulations built storm drains, culverts, street improvements, utilities and other facilities for an entire tract, and in the process expended $2,082,070, and incurred liabilities of $740,468, was held not entitled to complete development—at a loss of over $7,000 per day—without a permit from a newly created Coastal Commission.)[26]

There followed cases such as *Helix Land Co. v. City of San Diego,* 82 Cal.App.3d 932, 147 Cal.Rptr. 683 (1978) (barren, saline desert land in the mouth of the Tijuana River zoned "agricultural"); *Friedman v. City of Fairfax,* 81 Cal.App.3d 667, 146 Cal.Rptr. 687 (1978) (private property zoned for public recreation, even though trial court found that such zoning locked landowner into unprofitable use); *Frisco Land & Mining Co.,* 74 Cal.App.3d 736, 141 Cal.Rptr 820 (1977) (a truly Kafkaesque saga of a landowner driven

[26]Lest the court think such permit a formality, the Commission (which promptly began leading a charmed life in California courts—see Berger, *You Can't Win Them All—Or Can You?,* 54 Cal. State Bar Jour. 16 (1979)), was held capable of simply denying such permits for years, on the flimsy ground that the land in question ". . . *may* ultimately be designated for public use in the coastal zone plan . . ." *State of California v. Superior Court (Veta),* 12 Cal.3d 237, 255, 115 Cal.Rptr. 497, 509, 524 P.2d 128 (1974), emphasis added. It warrants emphatic notice that today, in 1980, that "plan" is still not completed. Compare this Court's view that government may not constitutionally depress values and then acquire: *United States v. Reynolds,* 397 U.S. 14, 16 (1970).

into foreclosure by a bizarre proceeding that terminated with a *post facto* ruling that he should have sought his administrative "remedies" before a then nonexistent agency which, after it later came into being, disclaimed any jurisdiction to consider his cause). More cases of egregious disregard of property rights could be readily mustered, particularly involving the California Coastal Commissions which literally pride themselves on their capricious and callous treatment of property owners within their jurisdictions, but the point emerges with clarity from the cases cited.

In other words, what happened in California is that regulatory entities, encouraged by the state courts, realized that land use "law" is not necessarily a stable set of rules to live by, but a constantly shifting kaleidoscope of local biases and ideological predilections, whose victims are not afforded any relief for the simple reason that if the property owner wishing to use his land is undeterred by one set of "regulations", another one promptly makes its appearance. In a noteworthy confusion between ends and means, the public profession of noble environmental goals is offered as a substitute for constitutional protection of private property. Much of this problem is rooted in *Selby Realty Co. v. City of San Buenaventura,* 10 Cal.3d 110, 109 Cal.Rptr. 799, 514 P.2d 111 (1973), where the California Supreme Court held that "the law" against which to measure an owner's rights is not the law in existence when he applies for and is denied leave to proceed with using his land, but rather "the law" at any time the regulating municipality chooses to change it.[27]

[27]The abusive potential of this development may be seen from the observations of a California municipal lawyer (City Attorney for the City of Thousand Oaks), instructing his fellows:

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One could easily swell this brief to impermissible proportions discussing in detail the increasingly harsh trends in California land use decisional law. Suffice it to say that in the last few years things in California have reached such alarming proportions that it can be said categorically that a California landowner's attempts at obtaining remedies in state courts are a wholly idle endeavor. This, incidentally, accounts for the soaring numbers of inverse condemnation cases in the Federal Courts in California.[28]

It would be hard to find a better example of what awaits a California landowner in state courts than *Briggs*

"If legal preventive maintenance does not work, and you still receive a claim attacking the land use regulation, or if you try the case and lose, don't worry about it. All is not lost. One of the extra 'goodies' contained in the recent Supreme Court case of *Selby v. City of San Buenaventura,* 10 C.3d 110, appears to allow the City to change the regulation in question, even after trial and judgment make it more reasonable, more restrictive, or whatever, and everybody starts over again." Longtin, *Avoiding and Defending Constitutional Attacks on Land Use Regulations (Including Inverse Condemnation),* 38B NIMLO Municipal Law Review 175, 192 (1975).

[28]See *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, supra; Rancho Palos Verdes Corp. v. City of Laguna Beach,* 547 F.2d 1092 (1976, 9th Cir.); *Newport Investments, Inc. v. City of Laguna Beach,* 564 F.2d 893 (1977, 9th Cir.); *Sederquist v. City of Tiburon,* 590 F.2d 278 (1978, 9th Cir.); *Isthmus Landowners Assn v. State of California,* 601 F.2d 1087 (1979, 9th Cir.); *Dahl v. City of Palo Alto,* 372 F.Supp. 647 (1974, N.D. Cal.); *Arastra Limited Partnership v. City of Palo Alto,* 401 F. Supp. 962 (1975, N.D. Cal.); *M. J. Brock & Son v. City of Davis,* 401 F.Supp. 354 (1975, N.D. Cal.); *Barbaccia v. County of Santa Clara,* 451 F.Supp. 260 (1978, N.D. Cal.); *Sanfilipo v. County of Santa Cruz,* 415 F.Supp. 1340 (1976, N.D. Cal.); *Kopetzke v. County of San Mateo,* 396 F.Supp. 1004 (1975, N.D. Cal.); *Trust of Three v. City of Emeryville,* 430 F.Supp. 833 (1977, N.D. Cal.); *Olinger v. City of Palm Springs,* 386 F.Supp. 1376 (1975, S.D. Cal.) vacated and remanded 538 F.2d 664 (1976, 9th Cir.). These, of course, are only the reported cases.

v. State of California, 98 Cal.App.3d 190, 159 Cal.Rptr. 390 (1979), the first reported California Court of Appeal case to apply the California Supreme Court's decision in the case at bench. In *Briggs,* the landowner was subjected to a two-pronged attack whereby one state body (the California Coastal Commission) denied her the permit necessary for improvement of her land, while another state agency (the Department of Parks and Recreation) moved at a glacial pace to condemn that land. The permit was denied after a furtive, *ex parte* communication between a Commissioner and the Parks Director. The Commission's denial of the permit took place in August, 1973. The owner was assured by state officials (including the Lieutenant Governor and Director of Parks and Recreation) that her land would be promptly condemned as soon as funds became available following a 1974 bond issue, and so, after exhausting her administrative remedies, she refrained from further efforts to improve it. In spite of issuance of the bonds, no such eminent domain action was filed until 1976,[29] but in the meantime, because of the permit denials and locally well-publicized and widely known governmental intent to condemn, the property lost *all* of its use and value, and no broker would even list it for sale. The trial court found on abundant and *undisputed* evidence that there was a *complete* loss of utility, value and saleability, so that by March, 1975, the

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[29]To rub salt in the wound, the state obtained a stay order from the California Court of Appeal, preventing the *Briggs* eminent domain proceedings from going to trial pending the disposition of the inverse condemnation action. Thus, the owner was simultaneously denied inverse condemnation relief as well as access to the courts to try the eminent domain case, thereby being denied any compensation *until the present time,* even though she was stripped of all attributes of ownership and value back in 1975. In the meantime she remains liable for property taxes.

property was *de facto* taken as no property rights remained in the owner. Since condemnation was planned, pursuit of non-monetary remedies would have been an act of utter futility, and the trial court so found. Just compensation was accordingly awarded. Nevertheless, the California Court of Appeal reversed, holding on the authority of *Agins* that the owner's *sole* remedy was a petition for a writ of mandate *to be brought within 60 days of permit denial, i.e., 1½ years before the de facto taking occurred!* As the *Briggs* opinion itself notes, such a writ action could not have succeeded; yet it was said to be the sole "remedy". In other words, California courts have applied *Agins* so as to require the owner in the *Briggs* case to perform the impossibility of receiving the remedy of invalidation 1½ years before the cause of action for the *de facto* taking accrued (compare *United States v. Dickinson*, 331 U.S. 745 (1947)).

Briggs, with its Catch-22 overtones, is not the only such California development; compare also *Toso v. City of Santa Barbara*, 151 Cal.Rptr. 912 (1979), (vacated by the California Supreme Court and summarily remanded for reconsideration in light of *Agins*), with the second opinion in that case: *Toso v. City of Santa Barbara*, ... Cal.App.3d ...., ... Cal.Rptr. .... (1980). What is astounding about such a comparison is the drastic reinterpretation of the facts in the second opinion under the impact of *Agins*, even though the evidence and trial court findings of fact were one and the same in both opinions. The second *Toso* decision makes invalidation well nigh unachievable, because it effectively forbids the landowner to prove that the "regulation" was not truly enacted in pursuit of legitimate police power objectives. See *infra*, fn. 31.

San Diego G. & E. Co. v. City of San Diego, 146 Cal.Rptr. 103 (1978), which is now pending before this Court as No. 79-678, provides another egregious example of the California courts' insensitivity to the Constitution's protection of property rights, that cries out for this Court's intervention. There the trial court found on clear evidence that the regulations in question completely destroyed the subject property's utility and value, and worked a taking. The California Court of Appeal affirmed (see 146 Cal.Rptr. at 112-113). Thus, when the California Supreme Court remanded that case to the Court of Appeal with directions to reconsider in light of *Agins*, one would have thought that the taking having been overwhelmingly established at both trial and appellate levels, it was only a matter of proper remedy (*i.e.*, since *Agins* forbade the awarding of just compensation, invalidation of the San Diego regulations would follow as a matter of course, the taking having been alleged, proved, found by the trial court and affirmed on appeal). However, in an inexplicable unpublished [second] opinion, the Court of Appeal failed to give any relief, and remanded the cause back for a bewildering and pointless retrial of the same facts (see Jurisdictional Statement in No. 79-678, Appendix G, p. G-4).

The point that emerges from the growing California case law is simply this: that State's decisional law particularly under the precedential authority of the California Supreme Court's decision in the case at bench, has now moved onto a tack whereby in regulatory taking cases it denies just compensation, but then also proclaims itself powerless to invalidate the regulations (on the theory that it is not for the judiciary to question legislative wisdom). That approach has now been ex-

tended so far that an aggrieved California landowner is stripped of even the basic due process right to show that the ostensible "regulation" has been enacted in bad faith—*i.e.*, that it is not promoting the police power objectives of public health, safety, welfare and morals, but rather serves impermissible governmental purposes. The second opinion in *Toso, supra*, unblushingly creates another rule of the Catch-22 variety: under this Court's criteria the aggrieved landowner may show that the regulation is not promotive of police power objectives (*Nectow v. Cambridge, supra*), but if he tries to do so in California he is told that he may not even inquire into the regulatory entity's constitutionally impermissible motivation. It follows that in their zeal to subordinate private property rights to the new ideology currently enjoying trendy acceptance in California governmental circles, the courts of that state have at long last formulated a rule that subordinates the mandate of the Constitution to the local law of remedies[30]—in direct contravention of this Court's holdings.[31] Note that California thus hews to its pre *Arlington Heights*, extremely narrow scope of constitutional review of land use ordinances (even in the context of exclusionary zoning; see *Assoc. Home Builders etc. v. City of Livermore*, 18 Cal.3d 582, 606, 135 Cal.Rptr. 41, 557 P.2d 437 (1976)). The

[30]What is a most revealingly remarkable feature of cases such as *Briggs, Toso II* and *San Diego G. & E.*, is that none of them either mention or acknowledge the existence or policy of the Constitution, and surbordinate the claims of *federal* constitutional violations before them to a bland discourse on state law of remedies.

[31]One inescapable attribute of California's new approach to judicial review of land use regulations is a sweeping invalida-

California landowner is said to have theoretical constitutional rights, but no available remedy to enforce them.

The blunt fact is that given the state of California's law of remedies in land use cases, a property owner in that state, seeking judicial relief for governmental invasion of his constitutionally protected property rights in the 1980's can expect about as sympathetic a judicial reception as a citizen seeking enforcement of his equal protection rights could expect from, say, the courts of Mississippi in the 1960's. Small wonder the workload of the federal courts in this area is growing. But however fierce any particular region's peculiar beliefs at any particular period in history may be, it is the Constitution—not local ideology—that is the supreme law of the land.

tion of the criteria this Court set out in *Arlington Heights v. Metro Housing Corp.*, 429 U.S. 252 (1977). Particularly note there Mr. Justice Powell's sensible observation that where the land use regulation is charged with an unconstitutional purpose, "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available" (429 U.S. at 266). As further noted there, sometimes a clear pattern of constitutionally impermissible conduct emerges, "[b]ut such cases are rare" (*Id.*), and most of the time ". . . the court must look to other evidence" (*Id.*). While these practical observations were made in the context of the Equal Protection Clause of the Fourteenth Amendment, no reason appears why one should ignore their good sense when dealing with violations of the Due Process clause of that very Amendment. As this Court so emphatically noted in *Lynch v. Household Finance Co.*, 405 U.S. 538, 552 (1972), the right to enjoy one's property without unlawful deprivation, is every bit as much protected by the Constitution as the other rights enumerated there: ". . . a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other." (405 U.S. at 552).

The fact that in as populous, growing, litigious and highly regulated State as California, there have been *no* reported cases of invalidation on taking grounds in almost two decades speaks for itself. Appellee is urging the supposed "remedy" of invalidation because it can read the cases as well as Appellants, and it knows full well that in today's judicial climate in California invalidation is no remedy at all. In sum, the danger posed by California's current sweeping, insensitive disregard of constitutionally protected property rights is clear from its *de facto* denial of *both* monetary and non-monetary remedies, and nothing short of this Court's unequivocal corrective action will suffice to protect those rights. What is in issue is the integrity of those citizens' rights that the Constitution binds and weaves together into a Bill of Rights—a coherent, reliable doctrine whereby an individual can on principle say to his government: "This far, and no further!"[32] Or, as the court put it in *South Cutler Bay, Inc. v. Metropolitan Dade County,* 349 F.Supp. 1205, 1206-1207 (1972, S.D. Fla.):

> "The rights to life, liberty and property, as well as those to free speech, a free press, and freedom of worship and assembly, were established as fundamental legal principles by the Declaration of Independence and the Bill of Rights. No one of them is more important than any other, and

[32]In the words of Mr. Justice Stevens, in his concurrence in *Moore v. East Cleveland,* 431 U.S. 494, 513-514 (1977):

> "The holding in Euclid v. Ambler Realty Co. . . ., that a city could use its police power, not just to abate a specific use of property which proved offensive, but also to create and implement a comprehensive plan for the use of land in the community, vastly diminished the rights of individual property owners. It did not, however, totally extinguish those rights. On the contrary, that case expressly recognized that the broad zoning power must be exercised within constitutional limits."

> all must be cherished and protected as the foundation upon which our nation was conceived and built. To relegate any of these basic rights to a status inferior to that of another could only undermine the Constitution and lay waste to 200 years of increasingly secure democracy.
>
> "As each of these rights should be accorded equal status, so must all be applied equally to every economic and social group: to rich and poor, black and white, young and old, moderate and extremist, law-abiding and mischievous—in short, to all Americans."

The *pragmatic* fact is that today Californians are left with *no* remedies against governmental "regulatory" invasion of their property rights, unless this Court intervenes, and applies the remedy provided for in the Fifth Amendment for uncompensated takings (cf. *Chicago B. & Q. R. Co. v. Chicago,* 166 U.S. 226 (1897)).

CONCLUSION.

In the end, the idea expressed by the Court in *Lynch v. Household Finance Co., supra,* 405 U.S. at 552, says it all. Not only are property rights expressly protected by the Constitution, but a fundamental interdependence exists between them and the other rights protected by the Bill of Rights; "neither can have meaning without the other" (*Id.*). A government that has it within its unrestrained power to strip citizens of their lawfully accumulated property, of their material well-being on which rests the day-to-day security of their families, has little need for overtly invading their other seemingly protected rights. That is the teaching of logic and the verdict of history.

The Agins pray for a day in court and for a fair, due process chance to prove their allegations against a proper constitutional standard. They pray that the judgment below be reversed and the cause remanded for a trial on the merits.

Respectfully submitted,

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